90-1652

No.

Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

October Term, 1991

LAWRENCE E. DALE

Petitioner,

vs.

AMERICAN FEDERATION OF STATE, COUNTY and MUNICIPAL EMPLOYEES, INTERNATIONAL, AFL-CLO

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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date: April 25, 1991

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QUESTIONS PRESENTED

1. Is it reversible error in a libel suit where Ohio's court of last resort reverses an Ohio Appeals Court decision and a juries decision in a case arising out of a public sector union representation election due to it misapprehension of federally derived rules and principles of law as they relate to a determination of the actual malice standard.

2. Does this case require Supreme Court supervision if it can be shown that the lower court's treatment of the Federal question was guided entirely by a misapprehension of federally derived rules and principles to the extent it did to reach the merits?

3. whether the jury function in passing on disputed question of fact and in drawing inference from proven facts has been respected.

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II. The decision of the Ohio Supreme Court as to the application of the actual malice standard is in conflict with this court and several state and federal court fulings.

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IN THE SUPREME COURT
OF THE UNITED STATES
TERM, 1991

LAWRENCE E. DALE,

Petitioner,

-vs-

AMERICAN FEDERATION OF STATE COUNTY
AND
MUNICIPAL EMPLOYEE, INTERNATION, AFL-CLO

Respondents

PETITION FOR A WRIT OF CERTIORARI

The petition Lawrence E. Dale, respectfully prays that a writ of issue to review the decision of the Ohio Supreme Court, entered in the above entitled proceeding on January 30, 1991.

OPINIONS BELOW

The Opinion of the Ohio Tenth District Court of Appeals is reprinted in the Appendix hereto.(Pg. A-1) This Opinion upheld the jury award for the petition. The Decision of the Ohio Supreme Court is also reprinted in the Appendix, hereto.(Pg. A-22) This Decision reversed the Appeals Court Decision and set aside the jury's award for the plaintiff (Dale).

JURISDICTION

Invoking federal jurisdiction under, 28 USC 2106. Under this statute error correction becomes an exercise of the Court's statutory power to set aside or reverse as may be just under the circumstances and judgment of a court lawfully brought before it. The Ohio court of last resort is the Ohio Supreme Court which made its final entry on this case on January 30, 1991. The federal question at issue here is the application of the actual malice standard. New York Times Co. v. Sullivan 376 US 254, 285 (1964).

STATEMENT OF THE CASE

Petitioner is a practicing Union representative/ organizer in Syracuse, New York and has been employed in this manner by various unions for several years since he completed his masters program in Industrial and Labor relations at the University of Oregon in 1978. In 1986 he instituted this libel action against AFSCME International of Washington D.C. for a defamatory statement if published against him in October of 1985 on the eve of an Ohio public sector election at the Apple Creek Development Center near Wooster Ohio. The leaflet,"Larry Dale Lied", is attached in the appendix.

In April of 1988 after a five day jury trial and with a properly instructed jury it was found that AFSCME had violated its qualified privilege and had maliciously libeled in accordance with the federally derived New York Times v. Sullivan rule or "actual malice" standard.

The libel action was pursued as malicious rather than merely negligent from the onset because of the timing of the release of the leaflet and because of the Linn rule (which is explained in the Ohio Supreme Court Decision in the appendix). It was pursued as malicious because it was untrue and was withheld from publication

for several weeks prior to balloting to avoid robust discussion of this pertinent issue. And it was pursued as malicious because it was posted for several days at Apple Creek and was used as a campaign tool against Dale's employer at at least one other large Hospital indicating a state of mind against Dale. Most importantly the malicious character of the publication can only be properly seen in the context of an anticipated close election where AFSCME had lost to Dale's employer only 30 days before the Apple Creek–Massillon State Hospital election was to occur. The jury made its inferences from the timing of the release of the information against Dale, it was admittedly meant to influence the outcome of the election at the expense of Dale's reputation.

The jury decision was upheld by the Ohio 10th District court of Appeals panel of judges whose opinion is attached in the appendix hereto. It is worth noting that the Appellate court took special care in analyzing Ms. Lozier's (the accuser's) testimony and found no reasonable basis as to why she would authorize her signature to be attached to the statement against Dale. Lozier had told two persons, Dale and Ms. Cassidy that she had "nothing to do with the leaflet" at the time of it's publication. Then later under oath, she changed her story. Her testimony is rife with her attempts to be evasive and the jury could easily see this. It is a matter of undisputed fact that Ms. Lozier had never provided reliable information against Dale to AFSCME. It was also abundantly clear from her testimony that she was unable to assess organizer's objectively given her inexperience about unionism in general. AFSCME has reason to know that new initiator into unions have little initial understanding of its highly complex process. This is why her testimony did not match her defamatory statement against Dale.

AFSCME appealed the Appeals Court Decision to

the Ohio Supreme Court. On January 30, 1991, it reversed the lower court's decision primarily on the basis that it believed Ms. Lozier was credible enough for AFSCME to quote disregarding the principle of law set forth in St. Amant v. Thompson. That discouraged undue exclusive reliance on sources which had not provided reliable information in the past. The Ohio Supreme Court exclusively focused on Ms. Lozier and even though the court concurred she had lied, it found that AFSCME's reliance on her statement was merely negligent and not malicious. The Ohio court of last resort did not address the plethora of other facts that provided evidence of additional negligence, ill motive and state of mind such that an accumulation of the evidence and the appropriate inference either supports of fails to support the existence of actual malice. It rationalized its narrow focus by claiming that it must balance the interests of the National Labor Relations Act with the states interest in protecting the legitimate rights of its citizens from defamation. The Ohio court of last resort over-turned a jury decision and ruled against the plaintiff/appellee because it was admittedly constrained by federally derived principles or rules that it misapprehends.

The Ohio Supreme Court not only misapprehended the principles of law with regard to a determination of actual malice from the facts, it also misapprehended at least one important pivotal fact. For example, it claimed that the literature against Dale "was published days before the election" this is untrue, the leaflet was published at the point of balloting. The Ohio Supreme Court decision reads as if all the jury heard was the single instance of Ms. Lozier's statement not being investigated, the jury heard much more. Despite the Dolein decision, where that court ruled that "the facts must be facts and not even the best expert in the field can

provide the bases on which to make a libelous comment". Dolein Corp v. Readers Digest Association 7 A.D. 2d, (N.Y.) 449. Ms. Lozier as this court will see, was far from being an expert, her testimony was compromised and evasive, and her purported statement was found to have no basis in truth. Yet on the basis of Ms. Lozier's statement alone and by disregarding its duty to review all the facts of the case the Ohio Supreme Court over-turned a jury's and an appeals court decision.

REASONS FOR GRANTING THE WRIT

THE ERRONEOUNESS OF THE STATE COURT DECISION WAS MORE THAN A DECISION OF LIMITED FACTUAL NATURE.

We know that in the case Florida v. Rodriguen, 469 U.S. (1984), the court granted review to undertake a de novo review of the factual findings of the state (trial) court that in the court's words reflected a misapprehension of the controlling principles of law. It is established that if a federal question is decided in such a way that conflicts with applicable decisions of other high state courts, the U.S. Supreme Court and Federal Courts, this would reflect a misapprehension of the controlling principles of law. The record is replete with examples of the Ohio Supreme Court's misapprehensions of controlling principles of law as they relate to the application of the actual malice standard. The lower court Ohio Supreme Court in its decision, attached, states that it properly applied the actual malice standard by ruling that Ms. Swank, an AFSCME agent, was merely negligent, not malicious by accepting Ms. Loziers unsubstantiated and untrue allegations against Mr. Dale because Ms. Lozier

was involved in the formation of an Independent Union that Dale organized. (Decision Pg. A-36) This ruling constitutes an entirely new and regressive standard never substantially accepted by other high courts and is a ruling in conflict with other applicable decisions.

The lower court's singular insistence focusing on the exclusive question of whether or not it was reasonable of Ms. Swank to rely on Ms. Lozier's lone statements in its determination of actual malice is by itself a violation of federally derived rulings on this issue. We know that actual malice determination must be made not from one lone and isolated variable but from the record as a whole. The jury in the instant case learned that the accusation was false as cited by the Ohio Supreme Court decision it then properly reviewed the facts in their totality to determine actual malice.

In Tavoulareas v. Washington Post Co., 759 F 2d 90, 124-25, rehearing granted, 763 f 2d 1472 (D.C. Cir. 1985), the court outlined some probative indicators of actual malice:

(a) "Lack of balance in some cases may be probative of actual malice." (see the Larry Dale Lied leaflet in appendix)

(b) "A defendants selection of the most damaging inference, an inference which is in fact false may be probative of a determination to incorrectly describe the plaintiff, place him in the most damaging light and thereby with other evidence demonstrate a state of mind that is probative of a reckless disregard for the truth."These principles were not followed by the Ohio Supreme Court in the instant case despite its being "replete" with evidence of actual malice. To ignore all the other evidence as it does strongly suggests the Ohio Supreme court's misapprehension of the controlling principles of law.

Justice Wright of the Ohio Supreme Court dissented from the majorities application of the federally derived standards to the facts. For instance, he cites in his dissent, attached, that "defendant's agent Swank had ample opportunity to confirm the defamatory allegations prior to publication, yet chose not to confirm those allegations in utter disregard for Dale's legally protected interest in his reputation."

It is worth noting other probable indicators of actual malice cited by Justice Wright and the other lower court justices in their Decisions that were not deemed applicable by the Ohio Supreme Court to the determination of actual malice despite the fact that Dale's the jury was ordered to consider them. They are as follows:

1. Swank learned of the allegations defaming Dale three to four weeks prior to publishing the defamatory statements; (admitted in Decision, attached)

2. Swank declined to confirm the allegations in spite of their nature, the ease of which she could have investigated them; (admitted in Decision, attached)

3. That the defamatory statements were posted in a locked, glass enclosed state bulletin board of several days. (cited in Decision attached Pg. A-37)

It is remarkable that all the Justices in Ohio's court of last resort fail to acknowledge what was evident to the jury and the Ohio Appeals court; i.e., the defamatory publication against Dale was posted at the point of balloting, not as they say, several days before the election. The following is evidence that shows this fact was not in dispute:

> *Swank Question:* You said earlier that the literature the "Larry Dale Lied" leaflet, was posted at about the time of the election?
> *Swank Answer:* "Yes" T. 190:(18-20)
> *Swank Question:* "So it was posted for general in-

formational purposes at the time of the election?"Swank Answer: "Yes" T. 190: (24-25 T. 191: (1)
Dale: (under cross examination by Mr. Sullivan the attorney for AFSCME at the time.)
Dale Question: "When did you first see a copy of the posting, of the leaflet posting?"
Dale Answer: "To the best of my recollection it was the day ballots were mailed out." Thats when I saw it. T. 320: (1-8)

At this point it is important to examine what evidence there is to support the finding by the Ohio Supreme Court that AFSCME was only negligent and not malicious in relying on Ms. Lozier's lone and false allegations against Dale. In Rodney Smolla's study, Law of Defamation, Clark Boardman Co. ltd., N.Y. (1986) we learn from his analysis of St. Amant v. Thompson, 380 U.S. 227.:

> "A court will typically infer actual malice from objective facts. These facts should provide evidence of negligence motive, intent such that an accumulation of the evidence and the appropriate inferences supports the existence of actual malice. (Appellee's brief, 10th district court of appeals, p(11).

Nowhere in the Ohio Supreme Court's decision is is indicated that this principle is followed. A question that one must ask in all fairness is this: Was Ms. Lozier a person who had supplied AFSCME with reliable information against Mr. Dale in the past? The record shows that Ms. Lozier was only met initially as part of a group by Mr. Otten an AFSCME agent, to discuss affiliation details and to give a presentation T. 486:(6-26). There was only the most superficial of relationships here and no meetings

prior to or during this one had ever transpired that provide reliable information against Mr. Dale:

> *Otten Question*: So when you talked to Ms. Lozier she gave you an example of what she felt Larry Dale had lied about?
> *Otten Answer*: "I don't recall her ever putting it in that kind of context."
> *Otten Question*: What you did you felt there was a problem so you called Ms. Swank to contact Ms. Lozier to find out what the problem is?
> *Otten Answer:* "that's correct"

Ms. Lozier was not a known quantity to AFSCME she could have been and may well have been a paid character assassin. It is because of this unfortunate possibility that federal derived principles have evolved especially under St. Amant v. Thompson which speaks to the reliance of unreliable sources as a probative indicator of actual malice when viewed with other evidence.
In Ms. Lozier's words:

> *Lozier Question*: Did there come a time when you got a phone call from a woman identifying herself as Sandy Swank?
> *Lozier Answer:* "Yes, I did"
> *Lozier Question:* Had you known Sandy Swank before that?
> *Lozier Answer:* "I never heard of her" T. 428:(20-24)

With this phone call introduction the publication against Dale was formulated.

It is also worth noting that when the Ohio 10th district appeals court panel of judges analyzed Ms. Lozier's testimony they found that Ms. Lozier had a very complete understanding of what was going on at the time that gave rise to her statements against Dale but could

find no evidence from her testimony that would give reasoned cause for her statement against Dale. (See the Ohio Tenth district court of appeals Opinion, attached.Pg. A11) Other indicators that federally derived principles were circumvented at the expense of the plaintiff appellees consitutionaly protected rights were also evident.

In the instant case millions of dollars of dues revenues were at stake and conceivably one vote could determine an election winner. In Burnett v. National Inquirer, Inc., 144 Cal. App 3d 991, 193 Cal Rptr, 206 (1983), that court found that in certain circumstances "the failure to verify a story by checking an obvious and accessible source may be so suspicious as to create an inference that the defendant entertained serious doubt and intentionally avoided verification for fear that it would contradict the story that the defendant was to publish "Id., Smolla, pp. (3–42) Again, at the plaintiffs expense Ohio's court of last resort ignored this issue. The record was replete with examples that would cause a prudent person to believe that AFSCME entertained serious doubts with its with holding of the defamatory information against Dale until the point (day) of balloting being the most conspicuous. In addition:

(a) It did not investigate whether or not there was any factual basis for the publication against Dale R. 190.

(b) Even thought the Wayne County Care Center was less than five miles from Ms. Swanks office she did not attempt to seek out any other facts. R.191.

(c) AFSCME admits it did not attempt to get Dale's side of the story. R.193–194.

(d) AFSCME admits and the Ohio Supreme Court's decision acknowledges that the defamatory literature was posted for public view in a heavily trafficed public facility for several days (Appellants appeals court

brief, p.(8) No. (23); and Ohio Supreme Court Decision.

(e) AFSCME does not dispute that Steve Wile another AFSCME agent disseminated the defamation against Dale at another large hospital at the point of balloting R. 127.

In Johnson Publishing Co. v. Davis 271 Ala 474 (1958) this court ruled that: "every attempt should be made to communicate with the maligned person to get his side of the story. Failure to even try to reach the person named will in almost every possible set of circumstances will be allowed to go to jury on the issue of gross negligence." The literature against Dale was allowed to be posted for weeks after being initially posted on the day of the election. It was also shown to the lower courts that under certain circumstances evidence of a refusal by a publisher to retract a statement after it has been demonstrated to be both false and defamatory might be relevant in showing recklessness at the time the statement was published, Golden Bear Distributing System v. Chase Revel, Inc. 708 F 2d 944 (5th Cir.) (1983). Dale testified at length about his efforts to have not only AFSCME, but the facility administrator to remove the publication. R. 322.

We also see that Ohio's court of last resort refused to broach the question: Was AFSCME's attack against Dale a calculated premediated falsehood? The evidence shows conclusively that it was calculated as already noted in our citation of Judge Wright's dissent. It would seem that AFSCME's admission that it withheld the defamatory information for weeks in advance of the election and then publicized the defamatory information once balloting began indicates ill motive, i.e., a willingness to steal votes and conceivably an entire election and garner the enormous revenues thereof at the expense of Dale's professional reputation and his credibility as a

trade unionist to his peers, a condition likely to haunt him the rest of his career given the stature of AFSCME in the labor community.

Dale's concern was not only the immediate loss that the defamation caused him in the '85 election, but how many other elections will he be caused to lose because of what the largest public sector union in the United States, AFSCME, wrote and refused to retract against him, a union that was formerly his employer. How many job opportunities and successes will Dale forego because Ohio's court of last resort misapprehended the principles of law as they relate to a determination of actual malice. It is without question that the jury decision was set aside inappropriately.

While recognizing that representation campaigns are heated affairs characterized by bitter and extreme charges, counter charges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions, the court in Linn v. United Plant Guard Workers, Local 114, held that malicious libel enjoys no constitutional protection in any context. 383 U.S. 53 61 LRRM 1600 (1962)

The Decision by the Ohio Supreme Court calls for an exercise of the U.S. Supreme Courts supervisory powers.

As alluded to in the statement above, the decision by the lower court failed to treat the relevant facts of this case in a manner prescribed by principles of law derived from rulings of this court, federal courts and other high state courts. Nowhere can it be shown that any court has properly decided a case regarding the application of the actual malice standard based on one sole issue and disregarded consideration of a constellation of facts presented to the jury. Certainly Ms. Lozier was entitled to her de-

famatory opinions but does this give AFSCME the right to publish them? The Ohio Supreme Court decision rationalized AFSCME's act against Dale in two ways. (See Decision in appendix):

First: Since Ms. Lozier was acquainted with Dale when he organized the Wayne County employees: this makes her a credible witness against him.

Second: The Ohio Supreme Court Decision adulterates the Record when it says, AFSCME published the information against Dale; "days before the election". The truth is, the defamatory leaflet against Dale was published at Apple Creek at the point of balloting and was verbally disseminated at Massillion State Hospital at the point of balloting as well.

The "first" rationalization has some credibility if the "second" is true i.e., that is if it was published days before the election. The jury knew that it was not published days before the election. It is completely above board to discuss an issue as important as a union organizer's conduct in the performance of his professional responsibilities, but AFSCME actively avoided an open robust discussion of this issue by not disseminating the information against Dale when it was available i.e., weeks before the balloting as Justice Wright pointed out in his dissent, attached.

There were a number of facts that came out in the evidence that were simply ignored by the lower court and some will be discussed in the next section. It is important to remember that Ms. Lozier was a housewife who worked as a cook and was at the time being given conflicting versions about an issue she knew little or nothing about i.e., union organizing and labor/management relations. If AFSCME was not manipulating Ms. Lozier and felt that she was a credible source then why did it wait to publish her defamatory information against Dale, why

didn't they raise the issue prior to balloting? Nevertheless, not withstanding this, AFSCME would still be guilty of practicing malicious libel given the numerous other probative indicators also ignored by the lower court indicating their state of mind against Dale.

In Ms. Cassidy's sworn testimony concerning Ms. Lozier we learn that Lozier told Ms. Cassidy at the time of publication (the point of balloting) that she did not write the letter, i.e. the defamatory leaflet. Dale also testified that Lozier told him she had nothing to do with it at the time.

> *Question*: "Isn't if possible that Sandy Swank asked Mary Ann (Lozier) to call you to talk about the leaflet?"
> *Cassidy's answer*: "When she called me she told me she didn't write the letter. She said, "I did not write that letter, I did not say that about Larry Dale" So I never would have said Sandy would have told her to call me because Sandy told me she wrote the letter." R.104:(3–9)

At this point it is evident,, contrary to Ms. Lozier's later testimony that Ms. Swank, the AFSCME agent, did not initially have Ms. Lozier's authorization or full cooperation. It is also worth noting that AFSCME blocked the introduction of Connie Roberts deposition as evidence. Connie Roberts was on the Wayne County Organizing Committee too, and was a key person organizing there at the time.

It was clear to the jury that Ms. Lozier could not show them one example of impropriety on Dale's part or that she had even the most rudimentary understanding of anything that related to the question of unions or labor management relations For example:

> *Question*: "So to begin with, was the independent union the first union you had ever been active

with?"
Lozier, answer: "Yes"
Question: "So you have never had any union experience before this?"
Lozier, answer: "That's right"
Question: "So there was a lot of new terminology, new ideas, was it a new environment for you in an overall way?"
Lozier answer: "Yes" R.480: 16–25
Question: "Okay, but was he (Dale) ever asked to negotiate a contract?"
Lozier answer: "No" R. 481: 12–14

There was no question to the jury as it inferred from the facts of the case that an experienced imported AFSCME agent, Ms. Swank, contrived a smear campaign against Mr. Dale by exploiting a novice union member who had little or no understanding at the time of how she was being used. Nevertheless, the Ohio Supreme Court exclusively focused on Ms. Lozier as being a credible source of information and refused to apply the principles of law set forth in Saint. Amant v. Thompson. The principles of law set forth in St. Amant teach us that one probable indicator of actual malice is reliance on the veracity of an informant where there are obvious reasons to doubt the accuracy of his reports. St. Amant v. Thompson 390 U.S. 727. Ms Swank testified that she had handled thousands of grievances as a union representative and with apparent exception of the allegation against Dale, she always investigated to arrive at the facts before processing the grievance. Judge Wright, the Ohio Supreme Court's dissenting Justice points to this inconsistency in his dissent (see Justice Wright's dissent in the Ohio Supreme Court Decision.

Another set of principles was ignored when the Ohio Supreme Court acknowledged that the publication

against Dale was allowed to be posted for "several days". In Faulk v. Aware, Inc. 19 A.D. 2d (N.Y.) 464, that court ruled that, "where the plaintiff can offer evidence that there were previous libels of the same nature made by the same defendants, the theory is that the repetition of published statements of a similar character shows a continuing state of mind on the part of the publisher or a continuing purpose or intent to injure person referred to. The most blatant form of a libel is a calculated falsehood". There is no dispute as to the facts that not only was the defamatory literature posted for several days beginning at the onset of balloting, another AFSCME agent, Steve Wile was disseminating the same defamatory information verbally at another large hospital at the time of balloting, too. There is no dispute as to the following facts that the publication against Dale was:

(a) Derived from a source that had never provided reliable information against Dale before.

(b) The information against Dale was withheld several weeks prior to balloting.

(c) The information was never verified in any manner. The plaintiff, though accessible, was never asked his side of the story.

(d) The defamatory information was published not prior to balloting, but at the point of balloting.

(e) It continued to be posted for several during balloting, after Dale had told them it was untrue.

(f) The defamatory information against Dale had no substantial basis in truth.

In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) this court outlined several fault requirements in determining negligence:

a. Were other potential sources of information and witnesses utilized and their existence was known?

b. The Post was found to be anxious to change its

image and the pressure to produce a successful expose.

c. Before the article was published allegations that the story was false were brought to the attention of the Post. Those allegations did not trigger any further investigation.

d. There was no time pressure to produce the story. e. The story was in no sense the war of the day. It appeared in a weekly magazine long after the football game in question.

Similarly, AFSCME admits not using other potential sources of information even though it was aware of their existence. Also, the jury learned that AFSCME had just lost a major election to Dale's employer 1199 and was anxious to produce a success in the Apple Creek and related hospital elections and decided to stretch the standards Dale explained to AFSCME at the time that the allegations against him were false. Lozier told Ms. Cassidy and Dale that at the time she had nothing to do with its publication. These allegations did not trigger any further investigation on behalf of AFSCME. Also, AFSCME freely admits that it withheld the information against Dale until the onset of balloting.

Neither AFSCME nor the Ohio Supreme Court see the contradiction between their support for a free and robust discussion occurring during the campaign portion that leads up to an election and calculated falsehoods being released at the time of balloting which taint an election because there was no discussion of these"new" issues prior to balloting. On the one hand the Ohio Supreme Court wants to uphold NLRA's principles that were adopted into Ohio's Labor law yet on the other it rules in the instant case to dilute those standards by allowing malicious libel to be used in tainting union election outcome. Although 1199 did not seek to have the Apple Creek and related hospital elections over-turned

does not mean it did not have grounds to do so and the decision not to do so may have been more due to other political considerations. 1199 and AFSCME have since then partially affiliated.

In Rebozo v. Washington Post Co., 637 F 2d 375 (5th Cir.), Cert. denied, 454 U.S. 964 (1981), that court held that the resolution of uncertainty in such a way as to cast the plaintiff in the worst possible light and to make a front page story of an episode which might not have commanded any significant attention could amount to evidence of a reporters reckless disregard for the truth. Here again, the similarity of the instant case to this principle of law enunciated in the Rebozo case is remarkable. the defamation against Dale would command no significant attention if it had been published prior to balloting. Regardless, it did cast the plaintiff in the worst possible light making an issue out of something that could be readily disproved and damaging to AFSCME had it been published prior to balloting. There were other rank and file organizers on Dales's Wayne County committee who would have exposed AFSCME's lies against Dale. AFSCME could not risk publishing prior to balloting and there by demonstrated that it entertained serious doubts as to the veracity of the information it published against Dale.

CONCLUSION

For these various reasons this petition for Certiorari should be granted and the decision of the Ohio Supreme Court because it is so clearly erroneous, should be reversed. Full briefing and arguing should be waived.

Respectfully Submitted,

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APPENDIX

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

LARRY DALE,

Plaintiff-Appellee,

v.

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION (AFSCME) ET AL.,

Defendants-Appellees,

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFSC AND ME-AFL-CIO,

Defendant-Appellant,
No. 88AP-802
(REGULAR CALENDAR)

OPINION
Rendered on September 18, 1989

MR. LARRY DALE, pro se.
MR. DANIEL S. SMITH, for defendants-appellees.
KIRSCHNER, WEINBERG & DEMPSEY, and MR. JOHN J. SULLIVAN, for defendant-appellant.

APPEAL from the Franklin County Court of Common Pleas. Young, J.

This case is before this court on the appeal of American Federation of State, County and Municipal Employees ("AFSCME"), appellant, from a judgment rendered in favor of appellee, Larry Dale, who was

awarded $1,000 in nominal damages and $14,000 in punitive damages based on a defamation claim.

Plaintiff was employed by the National Union o Hospital and Health Care Employees, AFL–CIO ("1199"), from March 1984 until November 1985. During that time, he was responsible for organizing state employees under the representation of 1199 in at least two locations: the Wayne County Care Center ("Care Center"), and the Apple Creek Development Center ("Apple Creek").

Appellee's attempts to organize the membership at the Care Center under 1199 apparently terminated some time after March 1985. Consequently, appellee, on his own, continued to work with the Care Center employees and helped them to organize an independent union.

After a representation election at the Care Center, the Independent Union of Care Center Employees was certified as the exclusive bargaining representative of the Care Center's employees, who voted to affiliate with 1199. Appellee apparently guaranteed that 1199 would negotiate a contract on behalf of the employees with their employer or, failing that, that appellee would negotiate the contract. However, 1199 subsequently rejected affiliation with the Independent Union of Care center Employees and stated that neither 1199 nor appellee, as a representative of that union, would negotiate the contract. The Independent Union then entered into discussions with AFSCME and eventually affiliated with it.

Pursuant to the situation which had occurred at the Care Center, Bill Otten, an AFSCME representative, engaged in conversation with Mary Anne Lozier, President of the Independent Union. Otten subsequently discussed the situation with AFSCME organizer Sandy Swank, who was assigned to organize employees at Apple Creek, and suggested that she contact Lozier. It should

be noted that AFSCME was the incumbent union at Apple Creek during this time. During a conversation between Swank and Lozier, Swank drafted a one-page leaflet which stated in part, in bold letters, "LARRY DALE LIED [,] PROMISED TO HELP [,] LEFT US [.]" The leaflet continued, as follows:

> "TO: ALL APPLE CREEK EMPLOYEES
>
> "Larry Dale came to Wayne County Care Center – made big promises he knew he couldn't keep – when confronted with carrying through with his promises – he left us and could not be found.
>
> "AFSCME/OCSEA representative came to see us – he was honest and straight forward, didn't make big promises he knew he could not keep.
>
> "Recently all the employees at Wayne County VOTED UNANIMOUSLY to affiliate with AFSCME/OCSEA.
>
> "DON'T BE FOOLED BY LARRY DALE'S PROMISES - HE'LL DO THE SAME THING TO YOU HE DID TO US.
>
> "EMPLOYEES OF WAYNE COUNTY CARE CENTER [.]"

The pamphlet is ostensibly signed by Mary Ann Lozier in her capacity as president of the Independent Union. However, in actuality, Sandy Swank signed Mary Ann Lozier's name to the leaflet with Lozier's permission.

During the time that the Apple Creek employees were mailing in their ballots for the representation

election, the "Larry Dale Lied" leaflet was posted on a number of locked, glass-enclosed bulletin boards at Apple Creek for at least three to four days in October 1985. Apple Creek employees subsequently voted to retain AFSCME rather than to organize under 1199.

Appellee thereafter filed a defamation action against two labor unions, AFSCME and Ohio Civil Service Employees Association, AFSCME Local 11, AFL-Cio ("OCSEA"), as well as two officials at Apple Creek. The basis of the suite was that appellee was libeled by the "Larry Dale Lied" leaflet; appellee sought as damages $1.420 in lost wages and $10,000,000 punitive damages. The two Apple Creek officials were later dismissed from the suit pursuant to motion.

Trial commenced on April 18, 1988. At the close of the evidence, the trial court granted OCSEA's motion for directed verdict but denied a similar motion filed by AFSCME. The jury then returned a verdict against AFSCME, awarding appellee $1,000 nominal damages, $14,000 punitive damages, and no compensatory damages.

AFSCME filed motions for a new trial and for judgment notwithstanding the verdict, both of which were denied by the trial court. AFSCME then timely filed the instant appeal and sets forth the following seven assignments of error 1:

> "The Trial Court Erred When It Ruled That Dale Was Not A Limited Purpose Public Figure Under Gertz V. Robert Welch, Inc., 418 U.S. 323 (1974).
>
> "the Findings By The Jury That The Larry Dale Lied Leaflet Was Published With Actual Malice Must Be Subject To Independent And De Novo Review By This Court.

"the Record Demonstrates No Clear And Convincing Evidence Of Actual Malice In The Publication Of The Larry Dale Lied Leaflet."The Evidence Does Not Support A Finding That The Larry Dale Lied Leaflet Was False.
"there Was No Evidence Presented At Trial That Would Permit A Reasonable Person To Conclude That The Plaintiff Has Proven That AFSCME Participated In, Condoned Or Ratified The Publication Of The Larry Dale Lied Leaflet.
"the Damages Awarded By The Jury In This Action Are Excessive As A Matter Of Law.
"the Trial Court Committed Reversible Error When It Denied AFSCME's Request For An Instruction And Special Interrogatory On The Issue Of Agency And Ratification."

Defamation is defined as a false publication causing injury to a person's reputation, or exposing him to public hatred, contempt, ridicule, shame, or disgrace, or affecting him adversely in his trade or business. Cleveland Leader Printing Co. v. Nethersole (1911), 84 Ohio St. 118. The law which has developed from defamation claims is at times perplexing since certain threshold questions must be answered during the course of a trial before the defamation law applicable to that certain situation can be applied.

1 It should be noted that AFSCME's brief contains a section entitled "Assignment [sid] of Error Presented for Review," a section labeled "Statement of Issues Presented for Review" and a section entitled "Argument." The assignments of error listed herein are from the "argument" section inasmuch as they are the issues briefed by AFSCME.

The facts at bar are somewhat unusual since they involve a private individual-plaintiff and a nonmedia-defendant. Thus, once distinguishing these operative facts, the defamation law applicable to this situation will be analyzed in conjunction with appellant's seven assignments of error.

In the first assignment of error, appellant asserts that the trial court erred when it found that appellee was not a public figure for a limited purpose. Appellant argues that under Gertz v. Robert Welch, Inc. (1974), 481 U.S. 323, appellee would be considered a "limited purpose public figure" since he voluntarily became involved in a particular public controversy, namely the union representation campaign involving the employees at Apple Creek. The Gertz court defined a "public figure" as a person who has thrust himself to the forefront of a particular public controversy in order to influence the resolution of the issues involved. Gertz, supra, at 351-351. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but examples of involuntary public figures are rare. One of the reasons for the holding in Gertz was that public officials and public figures have a much greater access to effective channels of communication and are better equipped to retaliate to the offending defamatory material than private individuals.

In order to reach a resolution regarding appellee's status as a "limited purpose public figure," it is necessary to examine the nature and extent of his participation in the union representation campaign. An individual may assume a special prominence in the resolution of a public controversy if he voluntarily injects himself or is drawn into a particular controversy which is of general interest

to the public. Id. However, a public controversy is not to be equated with all controversies that are of interest to the public.

Appellee's job title was that of a union organizer. His primary job objective was to convince employees that they could improve their working conditions by forming a union and thereby negotiating with their employer as one voice. Appellee was also trying to convince these employees of the advantages of affiliating with a strong, national union, such as 1199. As representative of 1199, appellee carried out these job objectives by talking with employees on a one–to–one basis and in small groups, at or near the work site when the employees were on their free time, or in the employees' homes after work hours. Once appellee convinced a handful of key employees to work for unionization and affiliation with 1199, he directed this core group of leaders to generate support and commitment among their co–workers. The very nature of appellee's work was people–oriented and his success was predicated on direct contact and communication with a certain group of people, albeit a target employee group. Thus, in order to succeed in his position, appellee's job required him to have extensive contact with a target group of employees. However, the very nature of appellee's job, in and of itself, does not give appellee the status of a "limited purpose public figure" in the context of a defamation claim. Many occupations, such as medicine, sales and service–oriented jobs, require extensive contact with people. thus, the nature of appellee's job as a union organizer is not enough to place him in the status of a "limited purpose public figure." The evidence must demonstrate that appellee voluntarily thrust himself into the forefront of the campaign in such a way that the focus of the campaign was not so much on the event, but rather on the appellee and his influence.

In the facts before this court, it is evident that the event itself, the union representation campaign of the employees of Apple Creek, may have been of general interest to the public, but was not a public controversy. Appellee may have been acquainted with many people who were affected by the outcome of the campaign, namely the target group of employees, but he was not generally known by the public at large. The public interest focus was on the campaign, the event itself, and was not focused upon appellee's actions of words as an influential determiner. In other words, the focus of the event, as supported by the evidence, was not appellee as an individual, but the campaign itself. The outcome of the election only affected the Apple Creek employees and was not a public controversy in the sense that the outcome would have directly affected the surrounding community.

Upon review of the record, there is no evidence of appellee's general fame or notoriety. The nature and extent of appellee's participation in the campaign was associated with appellee's job duties, as opposed to a situation where appellee would have voluntarily injected his opinions or views and would have been in such a position as to influence the voting of the employees. See Time, Inc. v. Hill (1967), 385 U.S. 374. Furthermore, appellee was severely limited in any realistic opportunity to counteract the false statement made against him. His request's to AFSCME union officials and Apple Creek administrators to remove the defamatory publication were largely ignored. See Gray v. General Motors Cor. (1977), 52 Ohio App. 2d 348. Accordingly, appellant's first assignment of error is not well-taken and is overruled.

Appellant's second, third, and fourth assignments of error regarding the "Larry Dale Lied" leaflet are interrelated and will be discussed together. Appellant's second assignment of error is predicated on the legal

conclusion that appellee was a limited purpose public figure. As already noted, the facts of this case involve a private individual–plaintiff and a nonmedia–defendant. Thus, the standard does not entail a First Amendment scrutiny. Based upon this court's disposition of appellant's first assignment of error, appellee was not a limited purpose public figure in relationship to the events surrounding his defamation claim. Therefore, appellant is not accorded a constitutional, de novo review upon this appeal.

Appellant contends in his third assignment of error that the record does not support clear and convincing evidence of actual malice in the publication of the "Larry Dale Lied" leaflet. Appellant further asserts in his fourth assignment of error that the evidence does not support the jury's finding that the "Larry Dale Lied" leaflet was false. Appellant's arguments are based upon the supposition that the facts before this court require a First Amendment constitutional standard of review. Appellant cites to cases which all set forth factual patterns involving media–defendants. However, the facts before this court involve a nonmedia–defendant. thus, the standard by which appellant, as a private defendant, must be measured is that of a reasonably prudent person (union) under similar circumstances. Restatement of the Law 2d, Torts (1977), Section 580B, Comment g.

The evidence before this court indicated that the union representation campaign was approaching an election which would determine the fate of the Apple Creek employees. AFSCME was the incumbent union and 1199 was attempting to oust any employee support of AFSCME.

There was evidence that polls conducted by AFSCME showed that AFSCME and 1199 were deadlocked a few days before the election. Three or four weeks prior to the

elections, Sandy Swank, the union organizer for AFSCME assigned to Apple Creek, had a conversation with Bill Otten, staff representative for AFSCME, regarding Appellee's involvement with the union organization campaign for the Wayne County Care Center employees and he suggested she contact Mary Anne Lozier, an employee at the Care Center and president of their AFSCME affiliate union. Ms. Swank telephoned Mary Anne Lozier and discussed appellee's involvement with the union organization for the Care center Employees. While she was talking to Ms. Lozier, Ms. Swank wrote the "Larry Dale Lied" leaflet.

Ms. Lozier authorized her signature on behalf of the Care center employees over the telephone since Ms. Swank indicated that she didn't have the time to go to the Care Center and have Ms. Lozier sign it. Evidence shows that the Care Center was approximately five miles from Apple Creek. Although the evidence varies at this point, the consensus of the testimony indicated that the "Larry Dale Lied" leaflet was posted in a locked, glass-enclosed union bulletin board in the main building of the Apple Creek facility for approximately three or four days during the time in which the election was taking place. Since it was a mail-in election, ballots were already in the hands of the employees. Given the fact that appellant is not a newspaper or a publication which is required to meet a deadline in order to disseminate information to the public, or under any duty to disseminate information to the public, any deadline which was set for the publication of the "Larry Dale Lied" leaflet would have been self-imposed by appellant. Thus, it would appear that the obvious haste in which the "Larry Dale Lied" leaflet was put together, and the timing of its publication may have been with malice in the context of an improper motive. Dun & Bradstreet v. Greenmoss Builders, Inc.

(1985), 472 U.S. 749. There is evidence to substantiate the jury's finding that the leaflet was put together with reckless disregard to the truth or falsity of the statements. Additionally, there is a factual basis from which the jury could have inferred actual malice.

The testimony, in particular that of Ms. Lozier and appellee, indicated that Ms. Lozier was well-informed by appellee and understood the different stages, developments, stumbling blocks, and contingencies which occurred throughout the process which eventually led to the Care Center's forming an independent union and affiliating with AFSCME. She understood that the core group of employees needed to collect a certain percentage of union pledge cards in order to petition for an election and gain 1199 support; she understood that this quota fluctuated with the number of workers employed at any given time; she understood why 1199 withdrew its support; she understood why the employees organized and elected to be an independent union; and she understood that an affiliation with 1199 was not an automatic result of that election. Furthermore, once appellee ended his involvement with the Care Center employees, he then became more involved in the Apple Creek campaign which facility was only five miles away from the Care Center. There was no evidence stating that Ms. Lozier or the Care Center employees either tried, or were unable to located the appellee once he curtailed his involvement with them.

When considering these accumulated facts, there was no factual basis within Ms. Lozier's testimony which the jury could have concluded was the basis of a lie told to her by appellee. Although Ms. Lozier may have been frustrated with the unionization process and disappointed in appellee's efforts, there is no support in her testimony which would serve as a factual basis for calling

appellee a liar. Furthermore, her mistaken belief in the truth of the matter is not sufficient to bar appellee's recovery. Restatement of Law 2d, Torts (1977), Section 581A, Comment h.

The language in the "Larry Dale Lied" leaflet constituted libel per se since it attributes to appellee, conduct or character which is incompatible with conduct that is proper in appellee's occupation. Matalka v. Lagemann (1985), 21 Ohio App. 3d 134. The language used in the "Larry Dale Lied" leaflet attacks appellee's veracity and integrity. Although appellant has asserted truth as an affirmative defense, the evidence does not support appellant's contention that the statements which were made in the "Larry Dale Lied" leaflet were true, nor does the evidence support appellant's contention that it is entitled to a qualified privilege.

To determine whether a publication is privileged, one must examine the circumstances of the publication, as well as the language employed. An exercise of good faith and the exercise of reasonable diligence to ascertain the truth of the statements are essential to establish the qualified privilege. See Landrum v. Dombey (1971), 30 Ohio App. 2d 200. the evidence clearly supports that appellant was not entitled to a qualified privilege. Although appellant contends that it is entitled to a qualified privilege on the basis that there was a common interest, in addition to a public or private duty to inform the public, namely the target group employees, appellant's conduct clearly exceeded the bounds of any qualified privilege. The evidence clearly supports that the"Larry Dale Lied" leaflet contained language and a context which were substantially false, and in its haste to publish the leaflet, appellant did not exercise reasonable diligence to ascertain the truth of the statements. Thus, appellant did not conduct itself according to that of a reasonable prudent

person (union) under similar circumstances.

Furthermore, the jury could have inferred that the appellant acted with actual malice from the following facts: (1) the leaflet was published; (2) it was published and prepared in an obvious haste; (3) there was no qualified privilege; and (4) the AFSCME union officials ignored appellant's request to remove the leaflet once it was published.

Based on the foregoing, there is clear and convincing evidence which demonstrates that the "Larry Dale Lied" leaflet was published with malice, and the evidence shows by a preponderance that the language and context of the "Larry Dale Lied" leaflet was substantially false. Appellant's second, third, and fourth assignments of error are not well-taken and are overruled.

In appellant's fifth and seventh assignments of error, appellant asserts that there was no evidence to prove that appellant participated in, or condoned or ratified the publication of the "Larry Dale Lied" leaflet and that it was reversible error to deny appellant's request for a jury instruction and a special interrogatory on the issue of agency and ratification. Upon review, the information which was eventually printed in the "Larry Dale Lied" leaflet first came to Sandy Swank's attention in a discussion with her supervisor, Bill Otten, an AFSCME staff representative. The evidence shows that Sandy Swank admitted to writing the "Larry Dale Lied" leaflet. The evidence also demonstrates that Sandy Swank's position was that of an AFSCME union organizer assigned to the campaign at Apple Creek.

In her testimony, Ms. Swank indicated that although she wrote the leaflet with the intent that it be posted. In any event, the leaflet ended up being posted on a glass-enclosed bulletin board. This bulletin board was locked and the only persons who had keys to the bulletin

board were AFSCME union officials and the Apple Creek administration. Therefore, the publication of the leaflet was a direct result of appellant's control. Furthermore, the evidence indicates that the leaflet was not taken down even after appellee approached an AFSCME union representative and asked that it be removed. Thus, even though Ms. Swank did the actual writing of the leaflet, it is clear from the evidence that the leaflet was then solely in appellant's control.

It is well-established in Ohio that punitive damages may not be recovered against a corporation in the absence of evidence that the corporation authorized, participated in consented to, acquiesced in, or ratified the malicious or outrageous conduct of its employees or that the corporation was negligent in the selection of its employees. See Gray, supra. Although it may or may not have been error for the trial court to deny appellant's request for a jury instruction and special interrogatory on the issue of agency and ratification, any such error is nonprejudicial. The record is replete with evidence that the corporation authorized, participated in, consented to, acquiesced in and ratified the conduct of its employees, based on the facts of this case.

An entity, such as the AFSCME union, can only act through its employees and agents. Appellant was directly responsible for the actual publication of the defamatory leaflet since the leaflet was in the control of AFSCME's employees or agents from the time it was written to the time it was published on the bulletin board. Furthermore, appellant is liable for the continued publication of the leaflet since it intentionally and unreasonably failed to remove the defamatory matter when requested to do so by appellee.

The defamation does not occur in the act of writing defamatory material. The actual defamation is

committed when defamatory statements are communicated to a third person. In the facts before this court, the appellant, through its employees and agents, clearly exerted the requisite control over the publishing of the leaflet to make appellant, and it alone, responsible for not only the leaflet's publication, but the continued publication even after appellee's request to have it removed. if there was any error in the trial court's failing to give the jury instruction and special interrogatory on ratification and agency, it was not reversible error in light of the fact that there is no evidence that Ms. Swank or any of the other AFSCME agents or employees were acting outside their scope of employment when they published the "Larry Dale Lied" leaflet.

Furthermore, there is no evidence in the record that the AFSCME employees or agents did not exert control over the leaflet from the time it was written to the time it was published, and there is no evidence that AFSCME's control over the publication of the leaflet was in some way curtailed after appellee requested that it be removed from the union bulletin board. Based on these circumstances, there was no need to instruct the jury on agency and ratification since the evidence overwhelmingly demonstrated that the defamatory act of publication was committed directly by appellant through the control if exhibited over its employees and agents in the scope of their employment. Accordingly, appellant's fifth and seventh assignments of error are not well-taken and are overruled.

In the sixth assignment of error, appellant asserts that the damages which were awarded to appellee, $1,000 nominal and $14,000 punitive, are excessive as a matter of law. The jury did not award any compensatory damages to appellee. Appellant cites the case of Quillet v. Johnson (C.P. 1947), 34 0.0. 308, for the proposition that

an award of $1,000 in nominal damages is excessive as a matter of law. Furthermore, appellant asserts that since the amount of nominal damages must be reduced to a trivial sum, it necessarily follows that the amount of punitive damages must be reduced since punitive damages must be reasonably proportionate to the actual damages sustained. See Gray, supra.

Upon review, this court relies upon the holding in the recent Ohio Supreme Court decision of Villella v. Waikem Motors, Inc. (1989), 45 Ohio St. 3d 36. In Villella, the Supreme Court affirmed an award for $150,000 in punitive damage where the jury determined the amount of compensatory damages as $250. The Supreme Court held that since there was substantial evidence to support the punitive damage award, the amount of punitive damages was not excessive when considering the facts of this case. Id. at 41. A reviewing court will not reverse a judgment on the basis of excessive damages unless the award is so outrageous and is an obvious indication that the jury acted from corruption, mistake, undue bias, or other improper influence. See The Ohio Public Service Co. v. Myers (1934), 54 Ohio App. 40, 49. Appellant asserts that $1,000 is not considered to be a trivial sum of money and is excessive in light of the reasoning for awarding nominal damages. The trial court instructed the jury on damages in the following manner:

> "***Actual injury includes impairment of reputation and standing in the community, personal humiliation, out-of-pocket loss and mental anguish and suffering.
> "In arriving at an amount of damages that would fairly and adequately compensate the plaintiff for his actual loss, you may consider only those losses which occurred in a natural

and continuous sequence as a result of the defamation.

"You may consider the following potential items of damage in reaching your damage determination: injury to reputation and standing in the community; shame, humiliation and mental suffering, if any.

"Now if you find that the plaintiff has suffered actual injury, you must then determine the amount which will fairly and adequately compensate the plaintiff for that injury. An injured plaintiff should not be deprived of compensation merely because he cannot prove the exact dollar value of the harm suffered.

"Now there's also -- it would be in your consideration, if the plaintiff establishes his case, you could consider nominal damages. Nominal damages are a small or rather insignificant sum awarded where there is no substantial injury but the plaintiff's rights have been injured or where there has been actual injury but the plaintiff fails to show its amount.

"So you would have for your consideration, depending upon your finding of the evidence, a question of either compensatory damages of nominal damages.

"Also, if you find for the plaintiff and award actual damages, you may also consider whether you will separately award punitive damages. If you do not find actual damages, you cannot consider punitive damages.

"Punitive damages is an amount which a jury may but is not required to award as punishment to discourage others from committing similar wrongful acts. Punitive damages may only be

awarded where a person injured another with actual malice.

"Actual malice, in this case, means that at the time of the publication, the defendant had knowledge that it was false or that the defendant acted in reckless disregard of the truth.

"If you award punitive damages, the amount should be fair and reasonable under all the facts and circumstances. It should not be excessive, nor actuated by passion of prejudice.

"The amount of punitive damage rests in the sound judgment of the jury***." (Tr. 753–754.)

In reviewing these instructions, the trial court defined actual injury as including "impairment of reputation and standing in the community, personal humiliation, out–of–pocket loss and mental anguish and suffering." The trial court then went on to explain nominal damages as damages of a small of insignificant amount "where there is no substantial injury but the plaintiff's rights have been injured or where there has been actual injury but the plaintiff fails to show its amount." The trial court included its definition of actual injury in the instruction of nominal damages. The trial court also included its definition of actual injury in its instruction on compensatory damages when it stated that the jury should consider "injury to reputation and standing in the community; shame, humiliation and suffering, if any." In light of the trial court's instructions regarding actual injury, it appears that the jury may have considered the trial court's definition of actual injury when it contemplated the amount of nominal damages it awarded to appellee. thus, the jury could have concluded that there was actual injury but that appellant failed to prove it.

In a claim for defamation, there is very little dis-

tinction between compensatory and nominal damages since the basis of the claim is to vindicate any injury to the plaintiff's reputation. It is difficult for anyone to place a dollar amount on impairment of one's reputation, personal humiliation, or mental anguish and suffering. Although the trial court's jury instructions may or may not have been in error, they are not so prejudicial as to warrant a new trial. Had the trial court given instructions which delineated more significantly the difference between nominal and compensatory damages, it is likely that the jury might have considered actual injury, as defined by the trial court, as part of the compensatory damages. A more refined instruction on nominal damages would have explained that the plaintiff is entitled to nominal damages if the jury finds that plaintiff was defamed but suffered no actual injury to his feelings or reputation. This court can only surmise, by the amount of nominal damages awarded, that the jury followed the trial court's instruction on nominal damages and considered appellee's actual injury, as defined by the trial court.

There is also the issue of presumed damages that need to be addressed. The rule against presumed damages has now been modified. If the plaintiff is a private person, that is, neither a public official nor a public figure, and the publication has no public concern content, then presumed damages are now constitutionally permissible. See Greenmoss, supra.

In the facts at bar, appellant is a private person. In determining whether the publication, the "Larry Dale Lied" leaflet, contained any content that would be of public concern, one must analyze the language and the context of the publication. Clearly, the "Larry Dale Lied" leaflet was only put together to reach a certain limited audience, the employees at Apple Creek, prior to, and during, their union representation election. The publica-

tion was only placed within the Apple Creek facility itself and it was strategically placed within a glass-enclosed bulletin board where employees normally looked for upcoming news and information regarding their union activities. Clearly, the publication had no public concern content and presumed damages would have been appropriate in the case at bar. However, since the amount of nominal damages seems to reflect "actual injury" incurred by appellant, an instruction on presumed damages would have only duplicated the trial court's instruction describing an award, whether it be nominal or compensatory damages, regarding any loss of reputation, personal humiliation or mental suffering and anguish which may have been endured by appellee.

Appellant also asserts that the $14,000 punitive damage award is excessive and should be proportionate to the amount of nominal damages awarded. Appellant's argument is based on the premise that the nominal damage award should be reduced as a matter of law. In light of this court's reasoning that the award for nominal damages was not excessive when considering the trial court's instruction, this court need only address the issue of whether the punitive damage award is proportionate to the amount of nominal damages awarded.

Punitive damages are awarded as a punishment and are based upon the malicious intent of the defendant. The amount of punitive damages to be awarded rests largely, in the first instance, with the jury. There is no mathematical formula to guide the jury, however, the amount of punitive damages to be awarded cannot be so disproportionate as to indicated that the jury set reason aside and was influenced by passion and prejudice. See Gray, supra, at 358-359.

In the facts at bar, the $14,000 punitive damage award bears a rational relation to the actual harm

suffered by appellee. The $14,000 punitive damage award is in proportion to the $1,000 nominal damage award and is not the result of the jury's passion or prejudice. In considering the nature of the wrong and the inherent problems of placing a dollar amount of a person's suffering, humiliation, and mental anguish, the $14,000 punitive damage award bears a reasonable relationship to the actual harm inflicted upon appellee by appellant. See Villella, supra.

Accordingly, the sixth assignment of error is not well-taken and is overruled.

Based on the foregoing, appellant's first, second, third, fourth, fifth, sixth, and seventh assignments of error are not well-taken and are overruled. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

McCORMAC, P.J., and BOWMAN, J. concur.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

LARRY DALE,

Plaintiff-Appellee,

v.

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION (AFSCME) ET AL.,

Defendants-Appellees,

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFSC AND ME-AFL-CIO,

Defendant-Appellant.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on September 28, 1989, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

McCORMAC, P.J., BOWMAN & YOUNG, JJ.

By Judge John C. Young
Judge John C. Young

cc: Larry Dale
John J. Sullivan
Daniel S. Smith
Anthony J. Celebrezze, Jr.

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

LARRY DALE

Plaintiff,

vs

OCSEA/AFSCME LOCAL 11, ET AL.,

Defendants.
Case No. 86CV-03-1892
Judge Deshler

DECISION AND JUDGMENT ENTRY

Rendered this 4 day of august, 1988
Deshler, J.

The Motion of Defendant AFSCME for Judgment notwithstanding the Verdict is OVERRULED. While it does not appear that Defendant's Motion for Judgment Notwithstanding the Verdict was timely filed, the Court concludes on the merits that there exists no basis for granting the motion as there is evidence upon which reasonable minds can differ as to all determinative issues.

The Motion of Defendant AFSCME for a new trial is OVERRULED.

DANA A. DESHLER, JUDGE

Copies to:
Larry Dale
plaintiff Pro Se
John J. Sullivan
Attorney for Defendant

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

LARRY DALE,

Plaintiff,

v.

OCSEA/AFSCME LOCAL 11, ET AL.,

Defendants.
Case No. 86 CV03-1892
Judge Dana A. Deshler

JUDGMENT ENTRY

A lawfully chosen and instructed jury in this action did find for the Plaintiff on the 22nd day of April, 1988, all the following:

1. That the Plaintiff did prove, by a preponderance of the evidence, that the Plaintiff's Exhibit Np. 1 is false or not substantially true.

2. That the Plaintiff did prove, by clear and convincing evidence, that the Plaintiff's Exhibit No. 1 was published by the Defendant AFSCME with the knowledge at the time of publication that the Plaintiff's Exhibit No. 1 was false or with reckless disregard of its truth.

3. That the Plaintiff did prove, by the required burdens, all elements of this cause of action.

4. That the Plaintiff did prove, by clear and convincing evidence, his claim for punitive damages from the Defendant AFSCME and assess the amount of the recovery due to the Plaintiff from the Defendant at the sum of Fourteen Thousand Dollars ($14,000);

5. And further assess the amount of recovery due to the Plaintiff from the Defendant at the sum of zero dollars as compensatory damages and One Thousand Dollars ($1,000) an nominal damages.

The Supreme Court of Ohio

1991 TERM

To wit: January 30, 1991

Larry Dale, Appellee,	:	Case No. 89-2047
v.	:	JUDGMENT ENTRY
Ohio Civil Service Employees Association et al.;	:	
American Federation of State, County & Municipal Employees, AFL-CIO, Appellant.	:	APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Franklin County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed and final judgment is entered in favor of appellant, AFSCME, consistent with the opinion rendered herein.

It is further ordered that the appellant recover from the appellee its costs herein expended; and that a mandate be sent to the Court of Common Pleas for Franklin County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

(Court of Appeals No. 88AP802)

THOMAS J. MOYER
Chief Justice

DECISION OF THE OHIO SUPREME COURT DALE, APPELLEE, v. OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION ET AL.; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, APPELLANT.

[Cite as Dale v. Ohio Civ. Serv. Emp. ASSN.(1991),____Ohio St. 3d_____.]

Labor relations -- "Labor dispute," defined-- Torts--Defamation--"Actual malice" standard applied to defamation claims founded upon statements made by and about participants in a public-sector labor dispute.

1. A"labor dispute" is any controversy over the terms and conditions of employment, or the representation of employees for collective bargaining purposes, regardless of whether the disputants stand in the relation of employer and employee, and regardless of whether the dispute is subject to the jurisdiction of the National labor Relations Board, the State Employment Relations Board, or some other administrative agency. (Yeager v. Local Union 20 (1983), 6 Ohio St. 3d 369, 6 OBR 421, 453 N.E. 2d 666, applied and followed.)

2. The "actual malice" standard of New york Times Co. v. Sullivan (1964), 376 U.S. 254, applies to defamation claims founded upon statements made by and about participants in a public-sector labor dispute. (Linn v United Plant Guard Workers of America (1966), 383 U.S. 53, and Yeager v. Local Union 20 (1983), 6 Ohio St. 3d 369, 6 OBR 421, 453 N.E. 2d 666,

applied and followed.)
(No. 89-2047--Submitted November 28, 1990--Decided_____, 1991.)
Appeal from the Court of Appeals for Fanklin County, No. 88AP-802.

Plaintiff-appellee Larry Dale was employed by the National Union of Hospital and Health Care Employees, District 1199-P (known coloquially as "1199") as a union organizer. His job was to visit employees, talk to them about the advantages of membership in 1199, and assist them in forming local unions.

1199 competed with defendant Ohio Civil Service Employees Association ("OCSEA"), an affiliate of defendant-appellant American Federation of State, County and Municipal Employees ("AFSCME") in an election conducted by the State Employment Relations Board ("SERB") to determine the exclusive bargaining representative for the employees of Apple Creek Developmental Center in Wooster. Apple Creek is a residential treatment facility for mentally retarded persons operated by the Department of Mental Retardation and Developmental Disabilities. 1199 and AFSCME actively campaigned at Apple Creek from sometime in 1984 until the election held on October 15, 1985

There was a lull in the Apple Creek organizing campaign in early 1985. Dale's supervisors at 1199 assigned him to attempt to organize the Wayne County Care center ("Wayne County"), a nearby nursing home. Dale initially attempted to organize the Wayne County employees as members of 1199. Officials of 1199 eventually decided that the Wayne County employees had not shown sufficient support to justify 1199's involvement, and declined to petition SERB for a representation election. Dale met with the union supporters at Wayne County and convinced them to form an independent un-

ion which, once established, could affiliated with 1199. Dale also promised that he would act as their negotiator even if they did not affiliate with 1199.

The Wayne County employees formed the Independent Union of Care Center Workers, which was certified by SERB as their exclusive bargaining representative. The Independent Union wanted to affiliate with 1199. Tom Woodruff, an 1199 official, met with the Independent Union's members. He told them that 1199 would not affiliate with the Independent Union, and that Dale would not assist them in negotiations.

Mary Ann Lozier, the Independent Union's president, testified that the union members felt angry and betrayed after the meeting with Woodruff. They held discussions with Bill Otten, a representative of AFSCME, and eventually voted to join Ohio Council 8, an affiliated of AFSCME.

Otten later told Sandy Swank, an AFSCME organizer working at Apple Creek, about the situation at Wayne County. At Otten's urging, Swank telephoned Lozier to learn Lozier's version of events. During this conversation, Swank drafted what has become known as the "Larry Dale Lied" leaflet. A reproduction of the leaflet is appended to this opinion.

With Lozier's authorization, Swank signed Lozier's name to the leaflet and distributed copies of it. A copy was posted in a locked, glassed-in bulletin board at Apple Creek reserved for union notices. The leaflet was left on display for several days before the election.

In 1986, Dale filed an action against OCSEA, AFSCME, and two Apple Creek officials, alleging that he had been defamed by the "Larry Dale Lied" leaflet. The trial court granted summary judgment for the Apple Creek officials, and directed a verdict for OCSEA. The jury returned a verdict for Dale against AFSCME, award-

ing $1,000 nominal and $14,000 punitive damages. The Court of Appeals fro Fankliin County affirmed.

This cause is before the court the allowance of a motion to certify the record.

Larry Dale, pro se.

Linda K. Filey, Kirschner, Weinberg & Dempsey, Richard Kirschner and Robert D. Lenhard, for appellant.

II. Brown, J. In this case, we must determine what standard applies to a defamation claim founded on statements made in the course of a union election, and whether Dale may recover under the appropriate standard. For the reasons which follow, we conclude that an "actual malice" standard applies, and that Dale has not presented sufficient evidence to recover under this standard. Accordingly, we reverse the courts below and enter judgment for AFSCME.

I

Standard of Proof Required in Defamation Claims Arising From Statements Made During Union Representation Elections Conducted Under SERB Jurisdiction

At common law, a defendant was strictly liable for publishing a defamatory statement unless he could prove that the statement was true or that it was protected by some privilege. Prosser & Keeton, Torts (5 Ed. 1984) 804, Section 113. In response to First Amendment concerns, American courts substantially altered the common-law standard of liability. The plaintiff in a defamation case now has the burden of proving both that the statement was false and the defendant was at least negligent in publishing it. See Lansdowne v. Beacon journal Pub. Co. (1987), 32 Ohio St. 3d 176, 178-180, 512 N.E. 2d 979, 982-983, and cases therin cited. In Lansdowne, supra, we took the further step of imposing a "clear and convincing" standard of proof on plaintiffs in

all defamation cases. Id. at 180–181, 512 N.E. 2d at 983–985.

In New York Times Co. v. Sullivan (1964), 376 U.S. 254, the United States Supreme Court established an even stricter rule for certain defamation cases. The stricter rule has come to be known as the "actual malice" standard. New York Times involved a suit by an elected city official of Montgomery, Alabama, over an allegedly defamatory political advertisement criticizing the city's treatment of civil rights protesters. Id. at 256–258. The court held that the First Amendment limits "a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." Id. at 283. In order to protect the "vigor and *** variety of public debate," the Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was mad with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 279–280.

Where the "actual malice" standard is applicable, and the trial results in a verdict for the plaintiff, appellate courts are required to independently review the evidence. Id. at 284–286; Bose Corp. v. Consumers Union of United States, Inc. (1984), 466 U.S. 485, 510–511; see, also, State, ex rel. Pizza, v. Strope (1990), 54 Ohio St. 3d 41, 560 N.E. 2d 765 (judgment in trial court which, if erroneous, would not result in suppression of protected speech does not receive de novo review); Lansdowne, supra, at 181, 512 N.E. 2d at 985 (independent review not required where "actual malice" standard does not apply). Here, we must first decide whether the "actual malice" standard applies to the alleged defamation.

A
Application Of The "actual Malice" Standard To Private Sector Labor Disputes

In Linn v. United Plant Guard Workers (1966), 383 U.S. 53, the court imposed the "actual malice" standard on state law defamation claims arising out of labor disputes subject to the jurisdiction of the National Labor Relations Board ("NLRB"). To achieve this end, the court specifically incorporated the standards set in New york Times v. Sullivan, supra. The court did so, not out of constitutional necessity, but as a means of accommodating the sometimes competing policies of the National Labor Relations Act ("NLRA") and state defamation law. Id. at 65. A major objective of the NLRA is to encourage free and vigorous discussion of labor–management issues. Id. at 62. State defamation law is intended to redress injuries to personal reputations. Id. at 63–64. In order to balance these interests, and to prevent the use of threatened defamation suits as economic weapons, the court held that the plaintiff in such a suit must show that the defamatory statement was published with actual malice and caused the plaintiff actual damage. Id. at 64–65; see, also, Farmer v. United Brotherhood of Carpenters & Joiners of America (1977), 430 R.S. 290, 305–306 ("The potential for undue interference with federal regulation would be intolerable if state tort recoveries could be based on the type of robust language and clash of strong personalities that may be commonplace in various labor contexts."); Old Dominion Branch No. 496 v. Austin (1974), 418 U.S. 264 (applying Linn rule to labor dispute involving federal employees, citing similar policy concerns)

B
Definition of a Labor Dispute

The applicability of the Linn rule to the facts before us turns upon the definition of a "labor dispute." In Yeager v. Local Union 20 (1983), 6 Ohio St. 3d 369, 6 OBR 421, 453 N.E. 2d 666, we used the definition found in Section 2(9) of the NLRA (Section 152[9], Title 29, U.S. Code): "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." (Emphasis added.)

As a matter of logic and experience, a "labor dispute" may be something other than a disagreement between the employer and its employees over conditions of employment. The definition of the term given in Section 2(9) of the NLRA reflects this. For example, disputes between rival unions over which has the right to represent a particular group of employees, such as the contest between AFSCME and 1199 in the instant case, clearly concern "the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms and conditions of employment ***." As Congress recognized during the drafting of the 1947 Taft-Hartley amendments to the NLRA, conflicts between two unions can be every bit as heated and disruptive as conflicts between a union and an employer. See, e.g., H. Report No. 245 on H.R. 3020 (1947) 5, reprinted in NLRB, I Legislative History of the Labor Management Relations Act, 1947 (1985) 296; 93 Cong. Rec. (Apr. 9, 1947) 3327-3329, reprinted in NLRB, II Legislative History of the Labor Management Relations Act, 1947 (1985) 995-997.

The definition contained in Section 2(9) of the

NLRA applies specifically to those employers and industries under the jurisdiction of the NLRB; however, we see no reason to limit the use of this definition to NLRB cases. As the instant case demonstrates, labor disputed can occur in public employment. See, e.g. Ebbing v. Hamilton (1985), 29 Ohio App. 3ds 69, 29 OBR 79, 502 N.E. 2d 661 (dispute under collective bargaining agreement). Labor disputed also occur in private industries falling under the jurisdiction of the National Mediation Board by virtue of the Railway Labor Act, see, e.g., Eastern Air Lines, Inc. v. Air Line Pilots Assn. (S.D. Fla. 1989), 710 F. Supp. 1342 (strike), and private industries whose labor relations are regulated by state administrative agencies, see, e.g., Reynolds, power and Privilege: Labor Unions in America (1984) 52 (describing intimidating picketing of residences by United Farm Workers and reaction of California Agricultural Labor Relations Board), as well as employment relationships not subject to the jurisdiction of any administrative agency, see, e.g., Natl. Labor Relations Bd. v. Yeshiva Univ. (1980), 444 U.S. 672 (union organization campaign among university faculty who were managerial employees not under NLRB jurisdiction); State, ex rel. Ohio Council 8, v. Spellacy (1985), 17 Ohio St. 3d 112, 17 OBR 260, 478 N.E. 2d 229 (collective bargaining by court employees not under SERB jurisdiction).

Accordingly, we take this opportunity to clarify and reaffirm our prior discussions of this issue, and hold that a "labor dispute" is any controversy over the terms and conditions of employment or the representation of employees for collective bargaining purposes, regardless of whether the disputants stand in the relation of employer and employee, and regardless of whether the dispute is subject to the jurisdiction of the National Labor

Relations Board, the State Employment Relations Board, or some other administrative agency.

C
Application of the "Actual Malice" Standard to Labor Disputes Governed by R.C. Chapter 4117

In a previous case, we applied the Linn rule to a claim of defamation arising from a handbill circulated by picketers outside an employer's place of business. Yeager, supra. Further, in Local Lodge 1297 v. Allen (1986), 22 Ohio St. 3d 228, 22 OBR 407, 490 N.E. 2d 865, paragraph two of the syllabus, we held (citing Linn and Yeager) that claims of intentional infliction of emotional distress and invasion of privacy could not be based on the use of "federally protected language" -- the epithet "scab" -- during a labor dispute.1 Like Linn, these cases involved labor disputed in the private sector within the NLRB's jurisdiction. Linn, supra at 55-56 (union campaign to organize employees of private security company); Yeager, supra, at 369-370, 6 OBR at 421-422, 453 N.E. 2d at 667-668 (picketing of private employer); Local Lodge 1297, supra, at 228-229, 22 OBR at 407, 490 N.E. 2d at 866-867 (picket-line altercations during strike at pump manufacturer). The instant case is different from Linn, Yeager, and Local Lodge 1297 in that it involves a public-sector labor dispute within the jurisdiction of SERB.

This difference does not present a reason to withhold application of the Linn rule. To the contrary, the policy interests expressed by the Supreme Court in Linn apply to public-sector labor relations under our statute. Like the NLRA, R.C. Chapter 4117 seeks to encourage the free and vigorous discussion of labor relations issues. This policy requires that participants be allowed considerable latitude for the "***bitter and extreme charges,

countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions***," Linn, supra, at 58, which often characterize labor disputes. Further, as in the private sector, there is the possibility that defamation suits could be used as economic weapons to secure an unwarranted advantage in bargaining. Linn, supra, at 64.

Accordingly, we conclude that the public policies underlying R.C. Chapter 4117 would be served by applying the Linn rule to public-sector labor disputes. We therefore hold that the "actual malice" standard of New York Times v. Sullivan applies to defamation claims founded upon statements made by and about participants in a public-sector labor dispute, such as that involved in the instant case.2

II
Application of the "Actual malice" Standard to the Instant Case

We next consider whether the trail court and the court of appeals properly found that the "Larry Dale Lied" leaflet was defamatory. Defamation is defined as a false publication which injures a person's reputation. Cleveland Leader printing Co. v. Nethersole (1911), 84 Ohio St. 118, 95 N.E. 735. A statement that someone is a liar, such as that made in the leaflet, clearly is one which would tend to injure that person's reputation, and courts have considered such statement to be defamatory on their face. Prewitt v. Wilson (1905), 128 Iowa 198, 103 N.W. 365; Smith v. Lyons (1918), 142 La. 975, 77 So. 896; Paxton v. Woodward (1904), 31 Mont. 195, 78 P. 215; Colvard v. Black (1900), 110 Ga. 642, 36 S.E. 80; Murphy v. Harty (1964), 238 Or 228, 393 P. 2d 206. As the court below noted, Dale presented sufficient evidence to support a finding that the leaflet was false, and that AFSCME was

at least negligent in publishing it. Further, AFSCME failed to establish that the leaflet was protected by a recognized privilege.

However, because the claim of defamation in the instant case is founded upon statements made during a labor dispute, Dale cannot recover unless the evidence shows that the "Larry Dale Lied" leaflet was published with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times, supra, at 279-280. This standard includes the requirement that we conduct an independent review of the sufficiency of the evidence. Old Dominion Branch No. 496, supra, at 282; New York Times, supra, at 284-286.

Construed most strongly in Dale's favor, the evidence of record establishes the following: Dale mad statement to the employees at Wayne County which led them to expect support from 1199 if they formed a union. Relying on this promise of aid, the Wayne County employees formed the Independent Union. Through no fault of Dale's, 1199 failed to provide the expected support. Lozier came to believe, wrongly, that Dale had lied, and communicated that belief to Swank, an agent of AFSCME. Swank then prepared and distributed the leaflet without independently verifying what Lozier had told her.

This is insufficient to establish "actual malice" as defined in New York Times, supra. There is no evidence that Swank had any direct knowledge of what happened at Wayne County. Nor was it reckless for Swank to rely on Lozier's statements in preparing the leaflet. Lozier had been intimately involved in the founding of the Independent Union, and was therefore in a position to know what had happened at Wayne County. While Swank may have been negligent in failing to inquire further before

publishing the leaflet, we cannot say she acted with "reckless disregard" in relying on information about the events at Wayne County given by the president of its union. Mere negligence is not enough to establish actual malice.3

III
Conclusion

The judgment of the court of appeals is reversed, and final judgment is entered in favor of appellant, AFSCME.

Judgment reversed.

MOYER, C.J., SWEENY, HOLMES, DOUGLAS and RESNICK, JJ., concur.

Wright, J., DISSENTS.

1 A concurring justice suggested that the tort claims in Local 1297 were, in substance, an attempt to recover for defamation. Id. at 234–235, 22 OBR at 412–413, 490 N.E. 2d at 870–871 (Douglas, J., concurring).

2 AFSCME also argues that the "actual malice" standard applies because Dale was a "limited-purpose public figure" under Gertz v. Robert Welch, Inc. (1974), 418 U.S. 323. In view of our holding that the "actual malice" standard applies because the defamation occurred during a labor dispute, we need not consider this issue.

3 Dale cites several cases for the proposition that Swank's failure to investigate before publishing the leaflet constitutes actual malice. St. Amant v. Thompson (1968), 390 U.S. 727; Curtiss Publishing Co. v. Bulls (1967), 388 U.S. 130; Tavoulareas v. Piro (C.A.D.C. 1985), 759 F. 2d 90, reversed in part on rehearing en banc (1987), 817 F. 2d 762. These cases actually state that a failure to investigate before publishing where the defendant has serious doubts that the statement is true constitute (or may be considered evidence of) actual malice. St. Amant, supra, at 731; Curtiss Publishing, supra, at 153; Tavoulareas, 759 F. 2d at 127–128, 130–131; 817 F. 2d at 797. As we have noted, there is nothing in the record to suggest that

Swank had serious doubts that Lozier was telling the truth. These cases are therefore inapposite.

Wrigtht, J., dissenting. While the majority competently set forth the proper legal standard applicable to the facts of this case, I dissent from the majority's application of that standard to the facts.

The record is replete with evidence sufficient to support a finding that defendant recklessly disregarded the truth, thereby establishing the "actual malice" necessary for recovery. Defendant's agent, Swank, a publisher of the defamatory allegations had ample opportunity to confirm the defamatory allegations prior to publication, yet chose not to confirm those allegations, in utter disregard for Dales's legally protected interest in his reputation.

Swank and Dale represented competing unions in a certification election at the time of the defamatory allegations. Swank learned of the allegations defaming Dale from another of defendant's organizers, Otten, three to four weeks prior to publishing the defamatory statements. Otten told Swank that Lozier had made the allegations. Swank then called Lozier to hear the allegations firsthand and to gain permission to attribute the statements to Lozier, to contrive the appearance that the statement were from an impartial source. However, Swank failed to confirm the allegations in spite of their nature, the ease with which she could have investigated them, and her experience with thousands of labor disputes which have led her to the belief that accusations require investigation. Instead, Swank published the defamatory material a few days prior to the election for the purpose of damaging Dale's reputation and thereby damaging support for Dale's union in the certification election. As was previously found by a jury and an appellate court, the evidence of defendant's reckless disregard for the truth is clear.

Therefore, I respectfully dissent from the result reached by the majority.

LARRY DALE
LIED *PROMISED TO HELP*
LEFT US

TO: ALL APPLE CREEK EMPLOYEES

Larry Dale came to Wayne County Care Center - made big promises he knew he couldn't keep - when confronted with carrying through with his promises - he left us and could not be found.

AFSCME/OCSEA representative came to see us - he was honest and straight forward, didn't make big promises he knew he could not keep.

Recently all the employees at Wayne County VOTED UNANIMOUSLY to affiliate with AFSCME/OCSEA.

DON'T BE FOOLED BY LARRY DALE'S PROMISES - HE'LL DO THE SAME THING TO YOU HE DID TO US.

EMPLOYEES OF WAYNE COUNTY
CARE CENTER

Mary Ann Lozier

PRESIDENT